

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be Argued by
HAROLD DUBLIRER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No.
76-1335

Appellee,

-v-

PETER VARIANO, HENRY BUCCI, ANTHONY
RUSSILLO, MICHAEL DeMICHAELS, JOHN
MONACO, and MICHAEL EVANGELISTA,

Defendant-Appellants.

DEFENDANT-APPELLANT EVANGELISTA'S REPLY BRIEF

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EVANGELISTA'S REPLY BRIEF

I

The Government did not give Evangelista the notice required by New York Criminal Procedure Law Sec. 700.50(3). The pretext is "because his voice had not been identified" (Gov. Br. p. 33). This statement is belied by other portions of the Government's brief.

The wiretap was in operation from November 8, 1974 to December 31, 1974 (Gov. Br. p. 4). Although Evangelista's name was not included in the wiretap application or order (Gov. Br. p. 33), he was kept under surveillance during the period of the tap and his appearance and voice were known to the police and FBI.

Thus, on eight separate occasions between December 10 and 23, 1974, Evangelista was observed meeting Murty or Picciano (Gov. Br. p. 11). On three of these occasions, Monaco^{1/} was observed meeting with Evangelista or Murty; on December 23, Monaco dropped off Evangelista and circled the block "until Evangelista had retrieved an object from some high weeds." (Gov. Br. p. 11, footnote**)

1/ Monaco was known to the Government as "a pick-up man" as early as September 3, 1974 (Gov. Br. pp. 24-25, 5-6).

The wiretap had picked up "a number of telephone calls during which Milrow transmitted policy wagers from his home in North Tarrytown to Evangelista in an apartment in the Bronx" at 929 East 213th Street (Gov. Br. p. 10), an apartment which the Government calls "the Bronx wireroom" (Gov. Br. p. 24).

On December 27, 1974, a search of Murty "revealed a large quantity of policy wagers. . .which reflected the exact policy wagers that Milrow transmitted to Evangelista during their electronically monitored telephone conversation earlier that day at 12:30 p.m." (Gov. Br. p. 11, footnote*, Emphasis ours)

On December 31, 1974, City, State and FBI officers raided the apartment at 929 East 213th Street and arrested Evangelista. He was "on the phone" (Tr.p. 812), and being recorded (Tr.1192) at the moment of arrest. (Gov. Br. pp. 10-11,24)

These references taken from the Government's brief and from the transcript establish that the police and FBI had identified Evangelista's voice by December 31, 1974, "when... the aim of the (wiretap) order had been attained." (Gov. Br. p. 36, footnote*). The Government's claim that his was a disembodied voice when the time came to give him notice is based on nothing but an excess of zeal.^{2/}

II

In addition, the Government argues (Br. pp. 33-34) that Evangelista was only entitled to notice "as the justice may determine in his discretion" (N.Y. Crim. Proc. L. Sec. 700.50(3))

^{2/} In the same vein is the artful statement (Gov. Br. p. 5, footnote*) that "[c]ircumstantial evidence. . .at the time of indictment suggested that Evangelista had been intercepted" and the charade of asking Evangelista for a voice exemplar "shortly before trial."

since he was not a "person named in the warrant," and that the burden is again on Evangelista to show abuse of discretion.

The argument begs the question. The justice who issued the eavesdropping warrant did not abuse his discretion by failing to order that notice be given to Evangelista. Discretion connotes choice. He had no choice; he exercised no discretion at all because the police and FBI never advised him that Evangelista was a "part[y] to the intercepted communication." N.Y. Crim Proc. L. Sec. 700.50 (3).

III

The Government relies (Br. p. 34) on United States v. Principie, 531 F.2d 1132. It ignores the New York law discussed in our main brief. It ignores the requirement of N.Y. Crim. Proc. L. Sec. 700.50(4) that the Government must show "exigent circumstances" to postpone the giving of notice "for a reasonable period of time."^{3/}

We respectfully submit that in Principie and its forebears the court overlooked or misapprehended the "exigent circumstances" provision of the New York statute when it held that the Government may ignore the notice provisions altogether and thereby put the burden of upholding those provisions on the defendant by requiring him to show that he was prejudiced by such Government lawlessness.^{4/}

^{3/} Evangelista was not given notice until "six weeks before trial", over a year later (Gov. Br. p. 5, footnote*).

^{4/} The practical effect of Principie is that the Government is better off by ignoring the statutory notice provisions than by seeking an extension of time to give notice, thus insuring the nullification of the notice provisions.

Of course Evangelista was prejudiced. He was prejudiced by being deprived of a right granted to him by law. Why should he have to justify the exercise of the right; the Legislature has already done so by enacting it.

Respectfully submitted,

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